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No. 79-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

FIDELITY UNION LIFE INSURANCE COMPANY,
Petitioner,

v.

SYLVIA PERRY, Individually and on Behalf of All Others Similarly Situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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Respondent says that the petitioner Fidelity Union urges a conflict in decisions between *Cochran* v. *Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979), and *Lowe* v. *Aarco-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976), as the reason for granting the writ. (Br. in Opp. 4.)

Not at all. There is such a conflict of decisions, but the conflict on which petitioner relies is the conflict

between the Fifth Circuit's decision in this case and the Seventh Circuit's decision in *Lowe*. It is quite immaterial that certiorari was not requested in *Cochran* or *Lowe*. This case is, as we pointed out in the petition, an a fortiori case of conflict with *Lowe* as compared with its companion, *Cochran*. Respondent's artless effort to distinguish this case from *Lowe* and *Cochran* demonstrates that point.

She says that in *Cochran* and *Lowe* state laws were involved that specifically regulated insurance-premium financing companies. (Br. in Opp. 4.) That is so. Yet, in *Lowe*, the Seventh Circuit held that Illinois' law regulating premium-financing companies was a "law enacted . . . for the purpose of regulating the business of insurance," which would be invalidated, impaired or superseded by the Truth in Lending Act. As a result, under Section 2(b) of the McCarran-Ferguson Act, the Truth in Lending Act was not applicable to the questioned conduct of a non-insurance company in financing insurance premiums.

Here the questioned conduct is that of an insurance company, which finances the payment of premiums on its own policies. That company, Fidelity Union, is regulated in the premium-financing aspect of its business pursuant to an Alabama statute that clearly was enacted to regulate the business of insurance companies. The Fifth Circuit held that nevertheless premium financing when engaged in by an insurance company is not the business of insurance. The conflict between that decision and the decision in *Lowe* is irreconcilable.

The other reasons respondent gives for not granting the writ are no more persuasive.

I

Contrary to respondent's seeming suggestion (Br. in Opp. 5-7), this Court by its decision last term in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), did not unconsciously resolve the conflict of decisions in favor of the Fifth Circuit's view that insurance-premium financing is not "the business of insurance" within the meaning of the McCarran-Ferguson Act.

Respondent seizes upon the emphasis in the *Royal Drug* majority opinion on the spreading and underwriting of risks as indispensable characteristics of insurance, concluding that this means that the only business between an insurance company and its policyholder that qualifies as the "business of insurance" is the insurance policy itself. The conclusion is unwarranted. The Court laid the emphasis it did on the spreading and underwriting of risks because of the nature of the issue that divided the Court in *Royal Drug*. The issue was whether contracts between an insurance company and third party providers, not policyholders, constituted the "business of insurance." The majority held that such contracts lacked the risk-taking, underwriting characteristics of the insurance contract. The majority also concluded separately that such contracts did not relate "to the contract between the insurer and the insured," *id.* at 215-17, and so did not qualify as the business of insurance on that ground. By no means did the Court overrule *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969), where the Court cataloged the numerous aspects of the McCarran-Ferguson Act's "business of insurance" (Pet. 8) in a manner wholly inconsistent with respondent's restrictive limitation of the phrase.

Nor did the Court in *Royal Drug* overrule *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1957), holding that the selling and advertising of insurance is the business of insurance, or disapprove of *Addrisi* v. *Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 429 U.S. 929 (1975), and *Dexter* v. *Equitable Life Assurance Soc'y*, 527 F.2d 233 (2d Cir. 1975), holding that even coercive techniques for selling insurance policies are the business of insurance.[1]

In this case, the financing of respondent's first policy premium was used by Fidelity as a means of ensuring the establishment of "[t]he relationship betwen insurer and insured," *SEC* v. *National Securities, Inc.*, *supra*, at 460, and the financing agreement was itself a part of the "contract of insurance," *id.*,[2] between Fidelity and respondent. Nothing in *Royal Drug* sug-

[1] In her discussion of these cases (Br. in Opp. 8-9), respondent misconceives Fidelity's argument at pages 9-10 of its petition. Fidelity does not argue that these cases establish that the lending of mortgage money by an insurance company constitutes the business of insurance (although this may in fact be so) but rather that, where an insurance company's activities in loaning to policyholders are integral to the relationship between the insurer and insured, they constitute the "business of insurance."

[2] Respondent's argument that the insurance company is a mere conduit for the extension of credit (Br. in Opp. 4-5) is mistaken. The kind of credit transaction involved here is solely between the insurer and the insured and is an integral part of the insurance policy, and only when it occurs in this form is it regulated by the Alabama Superintendent of Insurance. If a note is transferred to a bank, the transaction, as the record in this case discloses (see Defendant's Answers to Interrogatories, No. 14), is more nearly a loan than a sale; the agreement between Fidelity and the bank provides that the note will be returned to Fidelity upon the default of the maker, if any question of its validity is raised, or upon Fidelity's request.

gests that that kind of transaction is not the business of insurance.

II

Respondent's other argument seemingly puts aside the "business of insurance" test and argues that Alabama law is not invalidated, impaired or superseded by the federal Truth in Lending Act because it does not call for credit disclosures of the type required by federal law. Indeed, respondent erroneously asserts that Alabama law does not require "any particular credit disclosures of any type" in connection with its regulation of selling policies to students. (Br. in Opp. 4.) In fact, the Alabama Insurance Department's guidelines for companies offering life insurance plans to college students under a premium-financing arrangement (Pet. 99a-102a) do require credit disclosures, including a showing of the amount of the note and of any down payment made at the time of sale and the execution of a form reciting that the insured acknowledges and understands the provisions and obligations of the financial indebtedness that he has incurred (*id.* ¶¶ 2, 6). What respondent must mean is that, unlike the federal statute, Alabama law does not require disclosure of such credit terms as the dollar amount and rate of interest payable on such loans.[3]

Respondent's argument thus erroneously assumes that the McCarran-Ferguson exemption is triggered only when state regulation replicates the federal regulation, taking into account every practice covered by

[3] The note involved here, in the interests of full disclosure, did specify the annual interest rate and the dollar amount of the finance charges, but, contrary to respondent's suggestion (Br. in Opp. 3), Fidelity has never taken any action constituting a waiver of its position that the McCarran-Ferguson Act precludes application of the Truth in Lending Act.

the federal statute. The law is to the contrary. It has been long established that state law need not explicitly either proscribe or require the specific practice allegedly violating federal law in order for the exemption to apply, so long as there is state regulation of that aspect of the business of insurance. A state decision to permit and neither to prescribe nor to proscribe conduct is "superseded," if not "impaired" or "invalidated," within the terms of the McCarran-Ferguson Act, if a federal statute that deals specifically with the conduct is construed to apply. In *FTC* v. *Nation Casualty Co.*, 357 U.S. 560, 564 (1958), the Court rejected an argument against applying the exemption to a state law providing merely "a general prohibition designed to guarantee certain standards of conduct," which was criticized by the petitioner there, the FTC, as "too 'inchoate' to be 'regulation.'"[4]

[4] Many cases on the point have been decided by the lower federal courts, most involving the antitrust laws and the stringent standard of the proviso to § 2(b) of the McCarran-Ferguson Act, providing that the antitrust laws are "applicable to the business of insurance to the extent that such business is not regulated by State law." See Ohio AFL-CIO v. Insurance Rating Bd., 451 F.2d 1178, 1183 (6th Cir. 1971), *cert. denied*, 409 U.S. 917 (1972); Dexter v. Equitable Life Assurance Soc'y 527 F.2d 233, 236 (2d Cir. 1975) ("if the exemption is only to apply when state law squarely prohibits all acts which would, absent the exemption, violate [federal law], the state regulation which the McCarran-Ferguson Act aims to foster . . . would be a nullity"); Lawyers Title Co. v. St. Paul Title Ins. Corp., 526 F.2d 795, 797 (8th Cir. 1975) (immaterial whether state has displayed "zeal and efficiency" in enforcing its insurance laws); Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77, 84 (10th Cir. 1973); Steingart v. Equitable Life Assurance Soc'y, 366 F. Supp. 790, 795 (S.D.N.Y. 1973) ("efficacy or wisdom" of enactment immaterial); Schwartz v. Commonwealth Land Title Ins. Co., 374 F. Supp. 564, 575 (E.D. Pa. 1974); Fleming v. Travelers Indem. Co., 324 F. Supp. 1404, 1406 (D. Mass. 1971).

Alabama has demonstrated in the opening paragraphs of its guidelines that it considers the sale of premium-financed life insurance plans to college students an area "of concern." A primary purpose of the guidelines is to offer "additional safeguards for the protection of this segment of the insurance buying public," and the guidelines themselves display concern for disclosure of the financing arrangements to the insured, requiring an acknowledgement that he understands the arrangement and his obligations thereunder. (Pet. 99a-101a.) Accordingly, Fidelity's case is clearly distinguishable from the second holding in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 461-64 (1969), upon which respondent relies. There the state law was found to be aimed at protecting an interest, that of policyholders, different from the interest the federal law protected, that of shareholders. The guidelines make it clear that the purpose of the Alabama law is to protect the interest of the very segment of the insurance buying public to which respondent belongs and to insure, as the federal statute also purports to do, that this segment understands the regulated transaction. In sum, Alabama does regulate the credit aspects of the insurance transaction respondent seeks to subject to federal law, and the imposition of federal regulation would supersede the state law contrary to the McCarran-Ferguson Act.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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